

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FORT SMITH DIVISION

UNITED STATES OF AMERICA

PLAINTIFF/RESPONDENT

v.

No. 2:04-CR-20006

SCOTT JAMES EIZEMBER

DEFENDANT/PETITIONER

ORDER

The Court has received a report and recommendations (Doc. 58) from United States Magistrate Judge James R. Marschewski. Petitioner Scott James Eizember has filed objections (Doc. 59). The Magistrate recommends that Petitioner's motion to vacate (Doc. 53) be denied. The Magistrate further recommends that no certificate of appealability issue. The fundamental question in this case—whether 18 U.S.C. § 924(c)(3)(B) is unconstitutionally vague—has been explicitly answered in the negative by the Eighth Circuit. *See United States v. Prickett*, 839 F.3d 697, 700 (8th Cir. 2016) (“We therefore conclude that *Johnson* does not render § 924(c)(3)(B) unconstitutionally vague.”). Petitioner objects to the Magistrate's recommendation that no certificate of appealability should issue because the *Prickett* decision is the subject of a pending petition for certiorari to the Supreme Court and because of a circuit split of authority on this fundamental issue.

No certificate of appealability should issue unless “the applicant has made a substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2). That is, Petitioner must show that a reasonable jurist would find the Court's ruling debatable or wrong. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Petitioner's objection argues that because there is a circuit split on the vagueness of § 924(c)(3)(B), because a petition for certiorari will be filed in *Prickett* seeking to overturn the Eighth Circuit's holding, and because other courts have found similar statutes vague,

it should be clear that reasonable jurists would find the Court's ruling debatable or wrong. Petitioner's argument is persuasive—except to district court judges in the Eighth Circuit. No reasonable jurist can find the Court's ruling debatable or wrong because that ruling is, as Petitioner concedes, the ruling required of this Court. A certificate of appealability may be had, if at all, from the Court of Appeals.

Upon due consideration, the Court finds that Petitioner's objections offer neither law nor fact requiring departure from the Magistrate's findings and recommendations, that the Magistrate's report does not otherwise contain clear error, and that the report (Doc. 58) should be, and hereby is, ADOPTED IN ITS ENTIRETY.

IT IS THEREFORE ORDERED that Petitioner's motion to vacate (Doc. 53) is DENIED and this case is DISMISSED WITH PREJUDICE. No certificate of appealability shall issue.

Judgment will be entered accordingly.

IT IS SO ORDERED this 27th day of December, 2016.

/s/ P. K. Holmes, III

P.K. HOLMES, III
CHIEF U.S. DISTRICT JUDGE